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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TINLEY PARK COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146; ROBERT W. PROCUNIER, Superintendent of Community Consolidated School District No. 146; and THE BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 146,

Petitioners,

v.

KATHRYN M. JENNINGS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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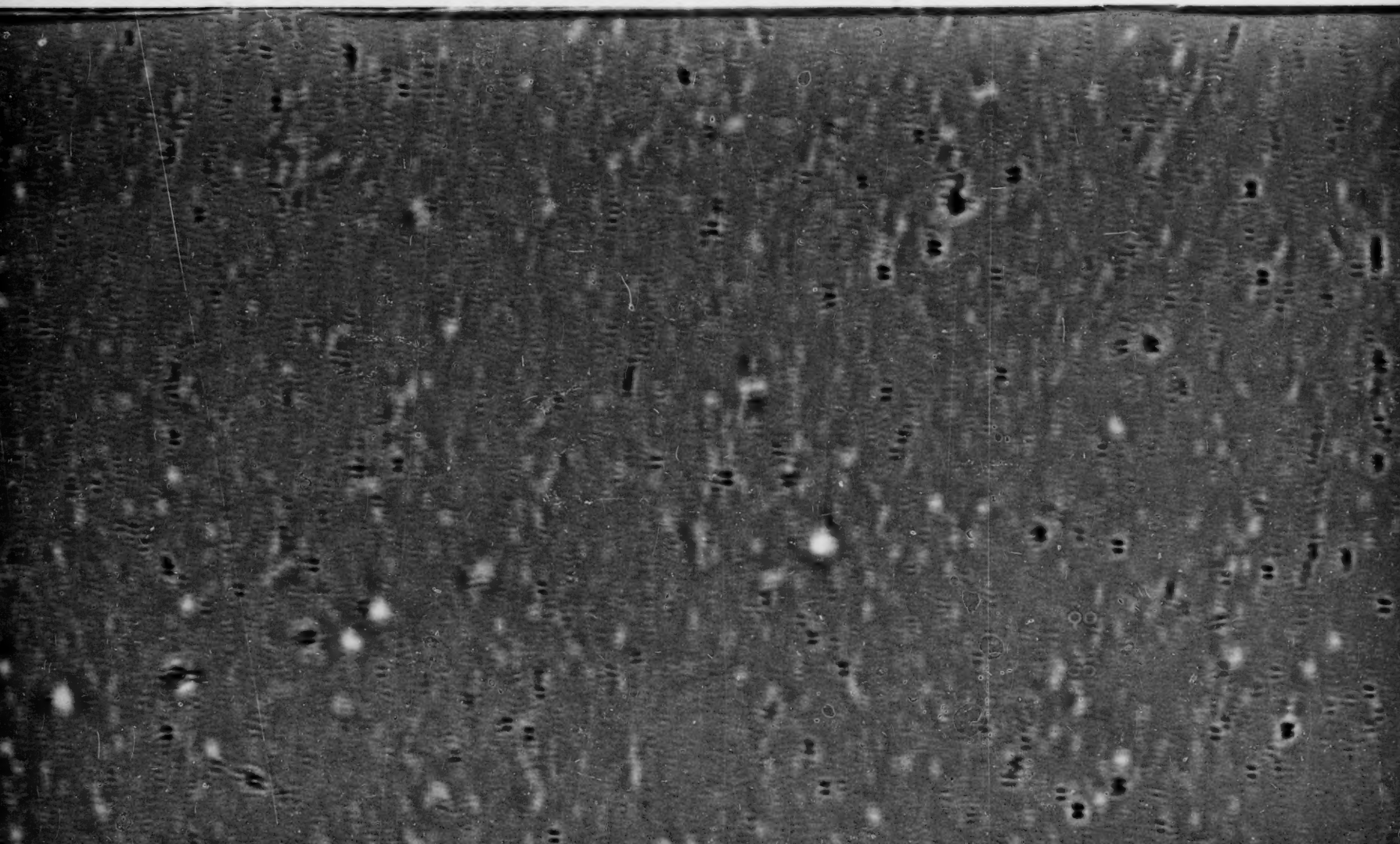

QUESTIONS PRESENTED

I. Should the Circuit Court of Appeals assume the role of fact-finder when the District Court fails to make the written findings of fact and conclusions of law required by Federal Rule 52, and the District Court's minimal oral findings are so conflicting as to make it impossible to discern the basis for that court's decision?

II. May an employer unilaterally declare an employee outside the protection afforded by Title VII by claiming that her lawful participation in activities opposing sex discrimination caused the employer to "lose trust and confidence" allegedly necessary to the employee's position?

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STATEMENT OF THE CASE

This action, brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, involves allegations of sex discrimination in employment and Plaintiff-Respondent Kathryn M. Jennings' wrongful discharge in retaliation for her activities in opposition thereto. Mrs. Jennings' First Amended Complaint alleged in pertinent

part that the all-female secretaries employed by Defendant-Petitioner Tinley Park Community Consolidated School District No. 146 were discriminated against in the terms and conditions of their employment, including the denial of premium overtime wages when such wages were paid to the all-male custodians employed by District 146. It was further alleged that Mrs. Jennings engaged in activities opposing these perceived discriminatory practices on June 1, 1979, and was thereafter subjected to repeated harassment by her supervisor, Defendant-Petitioner Robert W. Procunier, culminating in her discharge on June 15, 1979. (R. 11.)

The issues were tried before Judge Thomas R. McMillen of the United States District Court for the Northern District of Illinois, Eastern Division, on May 1-3, 1985. At the close of all the evidence, the District Court entered judgment for Defendants (R. 115), but failed to make the written findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure. Mrs. Jennings appealed that decision to the United States Court of Appeals for the Seventh Circuit.

On appeal, the Seventh Circuit noted that the District Court's minimal oral findings in regard to the alleged sex discrimination in Defendants' admitted policy of refusing to pay the all-female secretaries overtime wages were "not as clear as they might be." Nevertheless, after "interpreting and restating" the District Court's findings, the Seventh Circuit affirmed the ruling that Defendants had established a legitimate, nondiscriminatory reason for paying custodians for overtime but not secretaries. (Slip Op. at 4-7.)

On the issue of retaliation, however, the lack of proper findings of fact and conclusions of law left the Seventh Circuit in doubt as to whether the District Court had em-

ployed the proper standard of law, and unable to discern the factual basis for the District Court's ruling because of the conflicting findings stated orally. (Slip Op. at 9-10.) Accordingly, the Court vacated the judgment in favor of Defendants and remanded the case for further findings rather than attempting to decide the case on the inadequate record generated by the District Court. (Slip Op. at 11-12.) The majority declined to follow the dissent's suggestion that the Court of Appeals presume that the District Court applied the correct standard of law and make the findings of fact that the District Court failed to make. (Slip Op. at 12-19.)

Defendants' Petition for Rehearing and for Rehearing *en banc* was denied when no judge in active service requested a vote thereon, and all of the judges on the original panel, including the dissenting justice, voted to deny a rehearing.

The facts which led the Seventh Circuit to question whether Defendants had presented a legitimate, nondiscriminatory reason for firing Mrs. Jennings are set forth in the Court's opinion. Defendants' recital of "additional facts" at pages 4 to 7 of their Petition are not taken from any findings of the District Court, because no proper findings were made; nor do they represent findings of the Seventh Circuit, because that Court declined Defendants' invitation to act as fact-finder. Instead, the "facts" stated are nothing more than Defendants' argumentative interpretation of some of the evidence presented. In order to balance Defendants' one-sided recital, and to illustrate why the Seventh Circuit questioned the District Court's decision, Mrs. Jennings presents the following statement of undisputed facts established at trial which Defendants have completely omitted from their statement to this Court:

Defendant School District 146 employed two groups designated as Class I employees, secretaries and custodians. (R. 122, Pl. Ex. 13 at 3.) The "secretarial" employees were all female, and performed such varied duties as secretary, bookkeeper, switchboard operator, and printing press operator. (R. 91; Tr. 274, 185, 379-80.) The "custodial" employees were all male, and performed cleaning, snow removal, landscape maintenance, and furniture installation. (R. 91.) During her term of employment, from November 15, 1973 to June 15, 1979, Mrs. Jennings was classified as a secretary, and worked as Defendant Procunier's secretary, in addition to serving as recording secretary of the Defendant Board of Education for separate compensation. (Tr. 21, 23.)

As early as February, 1978, Procunier, chief administrative officer of the District, was informed that the secretaries were concerned about the disparate treatment accorded them in relation to the custodians, but his sole response was: "That's what the Board [of Education] wants. *C'est la guerre.*" (Tr. 169-70.) When conditions did not change, in 1979 the secretaries began a series of unproductive meetings with a member of the School District's administrative staff, Assistant Superintendent Noel Swinford, to express their concerns regarding the disparity in pay and working conditions between secretaries and custodians, including the School District's repeated refusal to compensate secretaries at all for overtime worked, while paying custodians for overtime at a rate of 1½ times their hourly rate of pay. (R. 91, 122; Tr. 58-60.)

An express procedure in the District's employee handbook provided that, if employees were not satisfied with the responses to their grievances, they had a right to address their concerns to the next higher authority until the matter was resolved. (Pl. Ex. 13 at 12.) Nevertheless, al-

though Mrs. Jennings told Procunier of the secretaries' dissatisfaction with Swinford's responses (R. 91; Tr. 110), Procunier refused her repeated requests that he meet with the secretaries and address their concerns. (Tr. 69.)

In May, 1979, Procunier promulgated a salary schedule for the 1979-1980 fiscal year which continued the perceived disparity between secretaries and custodians. (R. 122, Pl. Ex. 2 at 2.) He was informed of the secretaries' opposition, but again refused to meet with them. (Tr. 69.) Accordingly, because the administrative staff through the highest level failed to respond to their grievances, on the date that Procunier's proposed salary schedule was to be presented to the Board a group of secretaries attended the Board meeting and expressed their concerns. (R. 91; Tr. 73-74, 404.) The Board did not respond, but instead went into executive session with Procunier, then returned to open meeting and passed his salary schedule without comment. (Tr. 74-76, 404.) After the meeting, the secretaries decided to prepare a salary study and further explain their concerns to the Board in writing. (Tr. 224, 226, 259.) Mrs. Jennings also tried to make her individual feelings known to the Board by resigning as recording secretary, but Procunier would not accept her resignation and withheld her letter of protest from the Board until he decided to fire her. (Tr. 181-182, 105.)

The secretaries prepared a document entitled "P.S.: Salary Study" which contained a detailed comparison of the salaries paid to secretaries and custodians (R. 122, Pl. Ex. 4) and attached thereto the minutes of their meetings with Swinford regarding the lack of overtime pay. (R. 91.) The study was delivered simultaneously to Procunier and the members of the Board of Education on June 1, 1979. (R. 186-8.) Defendants now concede that there was no policy prohibiting staff members from com-

municating directly with the Board in this manner, and the District Court found that they had every right to do so. (Tr. 368, 456.) Defendants further admitted that delivery of the salary study in no way disrupted the School District's business. (Tr. 419.)

When Procunier received his copy of the salary study, he was upset by its contents and became extremely agitated when he learned that it had been given to the Board. (Tr. 81-83, 282.) At a meeting with the secretaries four days later, he berated them for not giving him the study, and accused them of giving it to the Board "to hurt him" (Tr. 87-88), threatening that "now no one would get anything." (Tr. 90-91, 247-50.) Procunier also gave the secretaries his own salary study which attempted to justify the salaries he had recommended to the Board, and admitted that, had he received the secretaries' study in advance, he probably would not have given it to the Board. (Tr. 91-93, 246.) It was not unusual for Procunier to withhold information from the Board (Tr. 249, 257), as he did Mrs. Jennings' letter of resignation.

It was stipulated that Mrs. Jennings possessed and utilized outstanding skills and performed her work well both before and after the June 1, 1979 salary study, and that Defendants had no reason to fire her based on her job performance. (R. 91; Tr. 433.) Further, despite his claimed loss of trust and confidence, Procunier admitted at trial that he had no reason to believe at any time during her employment that Mrs. Jennings would ever disseminate confidential material from his office (Tr. 424-427), and acknowledged that she was not required or expected to tell him everything, and that it was not her habit to do so. (Tr. 319, 427-29.)

Nevertheless, after June 1, 1979, Procunier's attitude toward Mrs. Jennings changed completely. Whereas before

that date, he had her open his mail and bring it in so that they could go through it together, after June 1 he had her just leave the mail, and even removed a chair from his office so that she would have no place to sit. (Tr. 100.) However, he still had her open the mail. (Tr. 100, 316.) He instructed her not to answer incoming calls on his personal telephone line, although she continued to handle all business calls. (Tr. 100.) Previously, Mrs. Jennings had brought business related problems in the office to Procunier's attention, such as the practice of paying salaries out of the imprest fund without deducting federal taxes, in contravention of an express Board directive. (Tr. 122, 127, 140.) After June 1, Procunier was resentful of such things and implied that Mrs. Jennings was being a "tattle-tale." (Tr. 100.) Throughout the period from June 1 until Mrs. Jennings was fired on June 15, Procunier continued to harp on the theme that delivery of the salary schedule to the Board was done to hurt him. (Tr. 101.)

On June 13, 1979, Procunier called Mrs. Jennings into his office and told her that he no longer trusted her, and that he felt that by permitting her to attend the secretaries' meetings, he had given them the erroneous impression that he approved of their meetings. (Tr. 103.) After Mrs. Jennings' discharge, those meetings ceased. (Tr. 331, 412.) Further, Mrs. Jennings informed Procunier on June 13 that one reason the secretaries had not given him the salary study in advance was their concern that he would not give it to the Board. (Tr. 196, 313.) Despite being reminded of his statement on June 5 that he probably would not have permitted the study to go to the Board, Procunier indicated that he expected Mrs. Jennings to tell the secretaries that he would have done so. (Tr. 313-14.)

Finally, on June 15, 1979, Procunier again called Mrs. Jennings into his office at the end of the day, told her he felt that she was not "loyal and supportive," and stated that he would recommend to the Board that she be terminated. (Tr. 105.) At trial, Procunier stated that he did not fire Mrs. Jennings because she disagreed with his policies, but acknowledged that he fired her when she did something about that disagreement. (Tr. 283-284.) He further testified that Mrs. Jennings was fired because she did not inform him that the secretaries were taking their salary study to the Board (Tr. 314), and "partially" because he lost trust in her. (Tr. 427.)

The District Court found that Mrs. Jennings at all times acted in good faith and reasonably believed that Defendants' policies were discriminatory (Tr. 372), and that she had established a strong *prima facie* case of retaliatory discharge. (Tr. 452.) The court further found that the activities in question violated no rule or policy of her employer (Tr. 368, 456), and Defendants admitted that those activities did not disrupt their business. (Tr. 419.)

It was unclear, however, what legitimate nondiscriminatory reason for her discharge the District Court found had been articulated in ruling in favor of Defendants. As noted by the Seventh Circuit:

> "The district court stated that the reason she was discharged 'was that she went over his head . . . and thereby lost his trust and confidence.' Tr. at 368. Yet at another point the court stated that 'he was not opposed to an employee going directly to the Board. . . .' Tr. at 456. At still another point the court refers to a 'personality conflict that developed rather quickly, triggered, perhaps, by the fact that he felt she was not being fair with him and taking this matter directly to the Board without discussing it with him or asking him to submit it to the Board.' Tr. at 457." (Slip Op. at 9, n.3.)

Accordingly, the Seventh Circuit remanded the case for further findings, stating as follows:

> "Further, we think that there is some reason to doubt whether defendant presented a legitimate, non-discriminatory reason for the discharge. As the Ninth Circuit has noted, almost every form of opposition to an employment practice is in some sense disloyal. See *EEOC v. Crown Zellerbach Corporation*, 720 F.2d 1008, 1014 (9th Cir. 1983). If mere 'disloyal' conduct could provide a legitimate basis for discharge, the protection extended by section 2000e-3 would be severely limited.
>
> * * *
>
> It is entirely possible that under all the circumstances Procunier showed a 'legitimate' reason for the discharge. But, because a sense of 'disloyalty' is inherent in almost any assertion of Title VII rights, we think it essential to determine whether the alleged disloyalty here constituted a legitimate business reason under the *Crown Zellerbach* test or was of a sort that is not cognizable as a defense to a retaliatory discharge claim." (Slip Op. at 10-12.)

REASONS WHY THE WRIT SHOULD BE DENIED

A.

THE SEVENTH CIRCUIT'S REMAND OF THE INSTANT CASE BECAUSE THE DISTRICT COURT'S CONFLICTING AND CONFUSING ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW NEED CLARIFICATION IS NOT A MOMENTOUS LEGAL ISSUE WORTHY OF THIS COURT'S REVIEW.

Defendants' vehement assertions to the contrary notwithstanding, the Seventh Circuit has not created any new standard of proof in a Title VII action, nor did it

shift the burden of persuasion to the Defendants. All that the Court definitively decided was that it could not decide at this point if the District Court's ruling was right or wrong because that court did not make the written findings of fact and conclusions of law required by Rule 52, and its oral findings and conclusions left the Seventh Circuit unable to determine what the basis for the ruling was, because the District Court's findings kept changing depending on its then prevailing view of the law.

The Seventh Circuit had every reason to believe that Mrs. Jennings was discharged for a reason prohibited by Title VII, namely, because she went over Procunier's head and took her complaints regarding discriminatory practices directly to the Board, thereby incurring Procunier's enmity. Indeed, the following undisputed evidence compelled such a finding:

1. Taking the salary study directly to the Board was perfectly proper and in keeping with District 146's own internal guidelines for taking grievances to the next higher authority if an employee was dissatisfied with the response at lower levels in the chain of command;

2. Far from showing that he had any legitimate expectation, or had even asked that Mrs. Jennings act as a spy and inform him of the secretaries' planned protest, Procunier himself testified that Mrs. Jennings was not in the habit of telling him everything, and it was not a requirement of her job that she do so;

3. Procunier was in fact informed of the existence and delivery of the salary study (just not in time to stop it), and in any event was well aware of its content since he had already heard and not only refused to redress each of the complaints therein, but also refused to even meet with the secretaries in contravention of the District's own policy for handling grievances;

4. During a lengthy diatribe berating their action, Procunier told the secretaries that, had he been informed of its existence in advance, their salary study would never have reached the Board, and now "none of them would get anything";

5. The study opposed the precise practices which Procunier advocated;

6. Procunier complained that the secretaries' action was done to "hurt" him and "make him look bad," and that, by "permitting" Mrs. Jennings to participate in their meetings, he might have given the secretaries the erroneous impression that he approved of their activities;

7. Contrary to his claimed loss of trust and confidence, Procunier acknowledged that he did not believe, either before or after the salary study, that Mrs. Jennings would violate her position and disseminate confidential information; and

8. Mrs. Jennings' discharge effectively put an end to meetings among the secretaries to discuss and seek redress of their grievances.

Thus, it appeared to the Seventh Circuit that the District Court's decision was based on a legally insufficient excuse for firing Mrs. Jennings and amounted to retaliatory discharge. Nevertheless, it exercised restraint and declined to engage in the type of fact finding which Defendants would have this Court indulge in—a function more properly left to the District Court. See *McDonald v. United Air Lines, Inc.*, 745 F.2d 1081 (7th Cir. 1984) (remand appropriate where District Court fails to provide adequate findings of fact or conclusions of law).

The standard applied by the Seventh Circuit in remanding this case for further findings is precisely that mandated by this Court, namely, that Defendants must articulate a *legitimate* nondiscriminatory reason for Mrs. Jennings'

discharge, *i.e.*, one which is *legally* sufficient to justify a verdict for Defendants if unrebutted. (*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).) Based on that standard, the Seventh Circuit decided that the District Court's decision *might* be wrong as a matter of law, but Defendants should be given the benefit of the doubt in light of the poor record generated by the District Court. There is nothing in that decision deserving of review by this Court.

B.

THE PROTECTION OF TITLE VII IS AFFORDED TO ALL EMPLOYEES WITHIN THE PROTECTED CLASS, NOT LIMITED TO THOSE OCCUPYING MENIAL POSITIONS.

What Defendants are really seeking in this case is apparent at pages 12-14 of their Petition. Under the guise of complaining of an "improper standard" created by the Seventh Circuit, Defendants are asking this Court to engraft an exception onto Title VII and hold, not only that some *conduct* in opposition to discriminatory practices is not protected by section 2000e-3 (42 U.S.C.A. § 2000e-3 (1981) (*i.e.*, conduct that disrupts the employer's business), but also that some *persons* otherwise within the class protected by Title VII nonetheless may be discharged for engaging in protected activities.

Defendants do not now dispute that the activity engaged in was one protected by Title VII. Instead, they urge that they could lawfully discharge Mrs. Jennings for her participation therein because she allegedly held a position requiring "trust and confidence," and her involvement in the protected activity caused her employer to lose its "trust and confidence." However, they do not cite any case holding that the protection afforded by Title VII is

limited to low level positions. There are none, because their theory is the antithesis of Title VII.

Title VII is designed to allow employees to advance in the marketplace unhandicapped by discrimination based on race, religion or sex. But under Defendants' theory, once employees make any gains and move beyond the most menial positions, they are stripped of Title VII's protection, doomed thereafter to suffer discrimination in silence because the very positions they attained under the aegis of Title VII have now made them fatally vulnerable to claims that their "disloyalty" in opposing their employers' discrimination caused a "loss of trust and confidence." Title VII contains no such restrictions, nor is there any case which would support Defendants' astounding view that its protection does not extend equally to employees who occupy positions of "trust and confidence." Mrs. Jennings is no more required to tolerate unlawful practices than were the "factory line workers and manufacturing employees" in *E.E.O.C. v. Crown Zellerbach Corporation*, 720 F.2d 1008 (9th Cir. 1983).

Faced with a lack of Title VII case law to support their unique theory of law, Defendants suggest that this Court apply two First Amendment/Freedom of Speech cases, *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983) to their version of the "facts." Those cases, however, are clearly inapposite. Governmental bodies suffer a unique handicap in their role as employers because of the First Amendment prohibition against abridging any person's right of free speech. Private employers suffer no such restrictions, and tension inevitably arises between the government's rights as an employer, and the employee's rights as a citizen. The cases cited by Defendants involve an attempt to balance those interests and decide what type of speech is protected and in what context.

Under Title VII, however, Congress has prescribed precisely what "speech" is to be protected, namely that in opposition to discriminatory employment practices, and it applies to *all* employers, private and governmental alike, and it applies to *all* employees, menial as well as those in "positions of trust and confidence." This was not a First Amendment case (as Defendants repeatedly reminded the Seventh Circuit in their brief and argument before that Court, even conceding that, if it were, they would lose), and neither *Pickering* nor *Connick* protects Defendants from their violation of the express mandate of Title VII.

Defendants also rely on *Hochstadt v. Worcester Foundation*, 545 F.2d 222 (1st Cir. 1976) as a case involving "different treatment of protectable interest for employees who enjoy a confidential, close-working relationship with their employer." (Def. Pet. at 13.) *Hochstadt*, however, was concerned with what *conduct* is protected by Title VII, not what *employees* are protected. That case merely stands for the proposition that Title VII does not give any employee *carte blanche* to engage in any activity she chooses under the guise of opposing discriminatory practices. An employee cannot allow her opposition activities to interfere with her work, and in *Hochstadt* the plaintiff's conduct was simply "beyond the pale" (545 F.2d at 230) in that she disrupted meetings, engaged in personal confrontations with supervisors, spread false rumors which drove employees away, and in every way became totally obsessed with her discrimination claims to the point where it disrupted the work of an entire institution. Here, in contrast, it has been stipulated that Mrs. Jennings was an outstanding employee, that there was no reason to discharge her based on her job performance, and that taking her complaints of sex discrimination directly to the

School Board was perfectly proper under the School District's own guidelines regarding handling of employee grievances and in no way disrupted the School District's business.

In effect, what Defendants propose is that they had a legitimate reason to fire Mrs. Jennings because *Procunier* disrupted her work; that Mrs. Jennings, who continued throughout to perform in an outstanding manner, was rightfully disciplined because of *Procunier*'s irrational behavior in disrupting his office routine because the secretaries "went over his head" to the Board of Education. *Procunier* may have been guilty of the type of excessive behavior found to justify discharge in *Hochstadt*, but it has been stipulated that Mrs. Jennings was not. Indeed, there is no case which even suggests that the hapless victim should be discharged because her lawful activities provoked retaliation by an out-of-control supervisor.

CONCLUSION

There is nothing in the instant case worthy of this Court's review, because the only ruling made thus far is that the District Court's conflicting findings of fact and unclear but seemingly infirm conclusions of law are inadequate for purposes of review. Defendants' assertions that the Seventh Circuit fashioned some new standard for Title VII cases, or somehow shifted the burden of proof to them is plainly unfounded, and is no more than an excuse to ask this Court to do what the Seventh Circuit refused to do, namely, assume the role of fact-finder. Indeed, what Defendants are seeking in the instant case is

to carve out an exception to Title VII which would allow them to deny some employees the protection clearly afforded by that law. There is nothing in the cases cited, nor in the purposes of Title VII, which would support Defendants' request for such a radical change in the law. To the contrary, the rule proposed by Defendants would virtually destroy Title VII's ban on retaliation against employees who engage in lawful activities designed to secure the rights promised by that statute, and simply cannot be the law.

Respectfully submitted,

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